

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE,)	
Petitioner,)	
)	
v.)	C.A. No. S09M-08-014 RFS
)	
CHRISTOPHER TENBUSCH,)	
Respondent,)	

MEMORANDUM OPINION

*Upon the State's Motion to Designate Defendant as a Tier II
Sex Offender. Granted.*

Submitted Date: July 29, 2010
Decided Date: August 30, 2010

David Hume, IV, Esquire, Deputy Attorney General, Department of Justice,
Georgetown, Delaware, Attorney for the State.

John M. Sandy, Esquire, Stumpf Vickers and Sandy, P.A., Georgetown, Delaware,
Attorney for Respondent.

STOKES, J.

Pending before the Court is the State's motion to designate Defendant Christopher Tenbusch a Tier II Sex Offender pursuant to 11 *Del.C.* § 4121(n). Defendant opposes the State's motion. For the reasons explained below, the State's motion is granted.

Delaware's Sex Offender Registration Statute, 11 *Del. C.* subchapter III, § 4120 through § 4122, has been amended numerous times since its enactment on June 27, 1994.¹ This subchapter is sometimes referred to as "Megan's Law." Like that of other jurisdictions, Delaware's statutory scheme provides for both sex offender registration and community notification.²

This case presents an issue of community notification. Pursuant to § 4121, after an individual is convicted of any offense enumerated in the statute, the Court must conduct a hearing at which the judge is required to designate the defendant as a sex offender and then assign the sex offender to one of three Risk Assessment Tier levels. The Court must assign tier designations according to the relevant crime pursuant to § 4121(e). The community notification provisions are triggered when a convicted offender is assigned to Tier II or III. *See* § 4121(j)(2), 4121(a)(1) and 4121(a)(3). Defendant asserts that he is a Tier I sex offender.

On June 1, 1994, Defendant pled guilty to one count of Aggravated Sexual Battery in Accomack County, Virginia. It is undisputed that Virginia's Aggravated Sexual Battery

¹*See State v. Adams*, 2010 WL 2893298 (Del. Super.).

²*Helman v. State*, 784 A.2d 1058, 1065 (Del. 2001). Title 11 *Del.C.* § 4120 and § 4121.

is the legal equivalent of Delaware's Unlawful Sexual Contact Second Degree. *See* 11 *Del. C.* § 768. Pursuant to § 4121(d)(2), USC 2nd degree is a Tier II offense, which triggers the notification requirements.

On November 13, 2002, Defendant registered in Delaware as a sex offender with the Delaware State Police. There is no tier designation indicated in the record.³

On August 14, 2009, the State moved the Court to designate Defendant as an out-of-state Tier II Sex Offender pursuant to 11 *Del. C.* § 4121(n), effective January 3, 2008:

Notwithstanding any provision of this section to the contrary, any sex offender convicted of any offense specified in **paragraph (a)(4)(c)** of this section [providing that out-of-state offenders are within the reach of subchapter III] shall be designated to a Risk Assessment Tier by the court. The designation shall be in accord with the provisions of subsection (d) of this section. (Emphasis added.)

The current version of Paragraph (a)(4)c, effective July 16, 2008,⁴ defines a “sex offender” as a person who has been convicted in another state of a crime that is legally equivalent to a crime enumerated in § 4121(a)(4)a, which specifies, *inter alia*, 11 *Del.C.* § 768.

³Defendant asserts in his letter response dated July 29, 2010, that he has been assigned as a Risk Assessment Tier I. Section 4121(d)(3) provides: “Any sex offender not otherwise designated to Risk Assessment Tier II or III in accord with paragraphs (d)(1) and (2) of this section shall be designated by the court to Risk Assessment Tier I.” The record shows no judicial designation having been made.

⁴76 Del.Laws, c. 374.

Prior to January 16, 2008, § 4121(a)(4)c provided that a “sex offender” is a person who was convicted of a crime equivalent to an enumerated crime “after June 27, 1994.” Defendant argues that because he was convicted in Virginia on June 1, 1994, the prior version of § 4121(a)(4)c applies to him and that he is not therefore a sex offender for purposes of § 4121(n). The Court disagrees.

The synopsis to the July 2008 amendments, including those made to § 4121, expresses a legislative intent to “require. . . sex offenders who were convicted of a sexual offense prior to the enactment of Megan’s Law [on June 27, 1994] to comply with provisions under § 4120, Title 11 of the Delaware Code.”⁵ Furthermore, the Delaware Supreme Court has held that amendments to §4121 may be applied retroactively because the statute is not punitive and its primary purpose is protection of the public.⁶ Thus, the current version of § 4121 may be applied to Defendant’s case. In other words, he is a “sex offender” because he has been convicted in Virginia of a crime that is the equivalent of an enumerated Delaware offense, even though that conviction occurred prior to the enactment of the Sex Offender Registration Statute on June 27, 1994.

The State argues that as a statutory out-of-state sex offender, Defendant is subject to mandatory tier designation by the Court pursuant to § 4121(d) and (n). Defendant

⁵76 Del. Laws ch. 374 (2008). *See also State v. Adams*, 2010 WL 2893298 (Del. Super).

⁶*Helman v. State*, 784 A.2d 1058 (Del. 2001)(construing sex offender registration and community notification scheme of 11 Del. C. § 4120 and § 4121, and holding, *inter alia*, that § 4121 is not punitive in nature and therefore may be applied retroactively).

disagrees. He argues that the tier assignment procedure is different for offenders who must retroactively register pursuant to § 4122(a) than it is for offenders convicted after June 27, 1994, the effective date of subchapter III. Defendant argues that pursuant to § 4122(c), the Board of Parole is authorized to redesignate him to a tier designation and that the Board of Parole need not adhere to the mandatory tier designations of § 4121(d) but may exercise discretion in assigning a defendant to Tier 1, 2, or 3.

These arguments have no merit. First, as previously found, *supra*, § 4121(n) requires the Court to make tier assignments for out-of-state offenders, and may be applied retroactively to Defendant's case. Second, § 4122(a), effective July 16, 2008,⁷ provides that "Section 4121 of this title shall be retroactively applicable to any person convicted of a registering offense." The previous version of §4122(a) provided that "Section 4121 of this title shall be applicable to any person convicted after June 21, 1996, but before March 1, 1999." The amended provision may be retroactively applied in this case for the same reasons set forth in regard to amendments of § 4121. Third, the language of § 4122(b), effective March 1, 1999,⁸ makes clear that this section applies to unilateral tier redesignations made by the Attorney General's Office.⁹ No such redesignation has been

⁷76 Del. Laws, c. 374.

⁸71 Del. Laws, c. 429, § 6.

⁹Section 4122 (b) provides as follows:
Notwithstanding any law, rule or regulation to the contrary, as soon after March 1, 1999, as is practicable, the Attorney General shall apply § 4121 of this title to those persons identified by subsection (a) of this section, and will redesignate those persons to a Risk Assessment Tier

made by the Attorney General in this case. Rather, the State seeks an order for a tier designation by the Court. Fourth, § 4122(c) provides that a redesignation made by the Attorney General’s Office under subsection (b) is subject to review by the Board of Parole. No such redesignation has been made in this case and therefore the Board of Parole has no role here. Fifth, Defendant’s argument that the Court is bound by the mandatory tier designations pursuant to § 4121(d), but the Board of Parole is not so bound is not supportable by the statute or any other authority.

Finally, Defendant makes an argument based on § 4121(s). That subsection, effective July 16, 2008,¹⁰ provides:

(s) Subject to § 4122 of this title, this section shall apply to all persons convicted.

The prior version of this subsection provided:

(s) Subject to § 4122 of this title, this section shall apply to persons convicted after February 29, 1999.

The July 2008 amendment, expanding the scope of § 4121 from persons convicted after February 29, 1999, to include “all persons convicted,” does not alter the analysis in this case.

For the foregoing reasons, the State’s motion to designate Defendant Tenbusch as a Tier II sex offender is **GRANTED**.

pursuant to § 4121 of this title. . . . the Attorney General shall have the authority to promulgate reasonable regulations to implement this subsection. . . .

¹⁰76 Del. Laws, c. 374.

IT IS SO ORDERED.

Richard F. Stokes

Original to Prothonotary